IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 383 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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CHANDRASINH MAHIPATSINH ZALA

Versus

SUB DIVISIONAL MAGISTRATE GONDAL

Appearance:

1. Special Criminal Application No. 383 of 2001

MR MR YB VAGHELA FOR MR ASHISH M DAGLI for Petitioner

MR KT DAVE APP Respondents

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 21/09/2001

ORAL JUDGEMENT

1. In this petition filed under Article 226 of the Constitution, petitioner has challenged order dated December 30, 2000, Annexure C to the petition, passed by the Sub-Divisional Magistrate, Gondal, District Rajkot, by which he has externed the petitioner for 1 1/2 years

from seven districts i.e., Rajkot City, Junagadh, Amreli, Jamnagar, Porbandar, Surendranagar and Bhavnagar and also the order dated April 7, 2001, Annexure E to the petition, passed by the appellate authority confirming the order of externment passed by the externing authority and prayed to quash and set aside both the above mentioned orders.

2. A show cause notice dated September 18, 2000 under section 59 of the Bombay Police Act ('the Act' for short) was issued to the petitioner in which five allegations were made against him to the effect that he is a strong headed, quarrelsome and aggressive person who has no fear of law and order, picking up quarrel with people and gives threats to kill them, continues his anti social activities by which he is causing physical and financial damage to the people and the people are afraid of filing complaint against him and the activities carried out by him are detrimental to the maintenance of public order. Besides this, three cases for the offences under Indian Penal Code were also registered against him at Chordi Police Station of Gondal Taluka. Therefore, by the show cause notice, the petitioner was called upon to show cause as to why he should not be externed for two years from the seven districts to which reference is made in earlier paragraph of this judgment.

3. The petitioner gave reply to the show cause notice. The externing authority after considering the reply and the material on record, passed the impugned order of externment dated December 30, 2000 by exercising powers conferred under Section 56 (a) of the Act externing the petitioner for a period of 1 1/2 years from the above mentioned seven districts.

4. Aggrieved by the aforesaid order passed by the externing authority, the petitioner preferred an appeal before the appellate authority, which was dismissed by the appellate authority vide order dated April 7, 2001, Annexure E to the petition, which has given rise to the present petition.

5. Mr. Y.B. Vaghela, learned advocate for the petitioner has raised several contentions and tried to convince this Court that the order of externment suffers from various vices much less it is recorded in clear non-application of mind. He contended that in the show cause notice dated September 18, 2000, it is stated that out of the three cases registered against the petitioner, two cases are stale as they were of the year 1995. Therefore, the order recorded on the basis of stale cases

suffers from the vice of non-application of mind.

6. He also contended that though in the impugned order of externment the externing authority has considered one more case registered against the petitioner at Gondal Taluka Police Station vide CR No. II-3152 of 2000 for the offences under sections 506 (2), 504 and 114 of the Indian Penal Code, there is no mention about the said case in the show cause notice and thus the externing authority has considered extraneous circumstance or material about which there is no mention in the show cause notice. According to the learned advocate for the petitioner, on this count, the order of externment suffers from clear non-application of mind and, therefore, prayed that both the orders may be quashed and set aside.

7. Mr. K.T. Dave, learned APP opposed the petition and contended that the petitioner is a strong headed person and his activities are detrimental to the society at large. As he is involved in three criminal cases, the externing authority has rightly passed the order externing the petitioner for a period of 1 1/2 years. He further tried to point out that in the impugned order the authority has not considered two stale cases. The order is passed on the basis of the last case registered against the petitioner in the year 2000 and therefore it cannot be said that the externment order was passed on the basis of stale cases. He, therefore, urged to dismiss the petition.

8. I have considered the submissions advanced by the learned advocates for the parties. I have also perused the averments made in the petition and the orders passed by the externing authority as well as the appellate authority and also other papers annexed to the petition.

9. It is true that the externing authority has in its notice dated September 18, 2000 issued to the petitioner did mention about five allegations as well as registration of three cases against the petitioner. Out of the three cases, two were of the year 1995. On having perusal of the impugned order, the externing authority has after referring to the two cases of the year 1995 mentioned that he has not taken into account those two cases for passing the order of externment against the petitioner but those cases are referred to in the show cause notice as well as in the impugned order of externment only with a view to show the criminal mind and criminal activities of the petitioner. I am unable to persuade myself to accept the contention advanced by Mr.

Dave that the externing authority has in the show cause notice and in the impugned order of externment referred to the two cases of 1995 with a view to show the criminal mind and criminal activities of the petitioner but while passing the order of externment he has not considered those cases as they are stale, because in my view, it is human psychology that when the cases are referred to, may be stale cases or otherwise, it comes to that the authority did consider the past activities. If the externing authority has not considered those stale cases, he ought not to have referred to them in the show cause notice as well as in the impugned order. Therefore, in my opinion, the impugned order of externment suffers from the non-application of mind.

10. Besides this, in the impugned order of externment, the externing authority did consider one more case registered against the petitioner vide CR No. II-3152 of 2000 registered with Gondal Taluka Police Station for the offences punishable under sections 506 (2), 504 and 114 of the IPC, which according to him, was registered during the pendency of the proceedings. Admittedly, the said case was not referred to in the notice as it was committed by the petitioner during the pendency of the proceedings. Therefore, it is clear that the externing authority has taken into account extraneous materials which are not subject matter of the show cause notice while passing the externment order. In this connection, reference can be made to the Division Bench of the Bombay High Court in the case of Ganu v. M.C. Chitle, 1988 Cr.LJ 1547 wherein the Bombay High Court has considered a similar case and held that while passing externment order if extraneous circumstances and material which were not subject matter of the show cause notice are taken into account by the authority the order of externment cannot be sustained and liable to be quashed. The ratio laid down in the said judgment is squarely applicable to the facts of the present case. Admittedly, the offence which is registered against the petitioner vide CR No. II-3152 of 2000 with Gondal Taluka Police Station was not the subject matter of the show cause notice but while passing the impugned order of externment, the externing authority has considered the same. The petitioner was not given any opportunity to reply to the said offence registered against him and thus it is clear that the externing authority has considered extraneous circumstances and material while passing the impugned order of externment. On this count also the order of externment requires to be quashed and set aside.

11. On over all view of the matter, the order of

externment passed by the externing authority externing the petitioner for a period of 1 1/2 years from seven districts and the order passed by the appellate authority confirming the externment order, both are required to be quashed and set aside.

12. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order of externment dated December 30, 2000, Annexure C, passed by the externing authority and the order dated April 7, 2001, Annexure E, passed by the appellate authority, both are quashed and set aside. Rule is made absolute. However, it is made clear that it would be open for the externing authority to initiate proceedings against the petitioner on the basis of the offence registered against him vide CR No. II- 3152 of 2000 with Gondal Taluka Police Station for the offences under sections 506 (2), 504 and 114 of the IPC by issuing fresh show cause notice if the facts and circumstances and the activities of the petitioner so necessitate. Direct service is permitted.

(A.M. Kapadia, J.)

(karan)